IN THE

Supreme Court of the United States

No. 6[illegible]196

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

WILBUR H. MOHNEY,
Respondent.

MOTION AND PETITION FOR WRIT OF CERTIORARI, AND BRIEF IN SUPPORT

JOHN H. DOYLE,
HOWARD LEWIS,
Attorneys for Petitioner

Of Counsel:
DOYLE & LEWIS,
F. W. GAINES,
TOLEDO, OHIO.

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MOTION FOR WRIT OF CERTIORARI.

And now comes petitioner by its attorneys and moves this Honorable Court that it, by certiorari, or by other proper process, directed to the Honorable Judges of the Court of Appeals of Lucas County, Ohio, require the said Court of Appeals aforesaid, to certify to this Honorable Court for review and determination, a certain cause lately depending in the said Court of Appeals aforesaid, wherein this petitioner was plaintiff in error and Wilbur H. Mohney was defendant in error, and to that end the said petitioner tenders herewith its petition and brief, with a certified copy of the entire record of this cause in the said Court of Appeals of Lucas County, Ohio, together with a certified copy of the record of proceedings had, looking toward a review of the same in the said Court of Appeals of Lucas County Ohio.

JOHN H. DOYLE,
HOWARD LEWIS,
Attorneys for Petitioner.

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IN THE SUPREME COURT OF THE UNITED STATES.

THE NEW YORK CENTRAL RAILROAD COMPANY,
Petitioner,

vs.

WILBUR H. MOHNEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully petitions for a review, by your Honorable Court, of the proceedings of the Court of Appeals of Lucas County, Ohio, in the case of The New York Central Railroad Company, plaintiff in error, against Wilbur H. Mohney, defendant in error, wherein that Court rendered a final judgment against your petitioner, and which by due process has been made final in the Courts of the State of Ohio by reason of the refusal of the Supreme Court of the State of Ohio to review the judgment of the Court of Appeals upon a motion to certify the record duly filed in the said Supreme Court of Ohio, and also by reason of the refusal of said Court to review the said judgment upon a petition in error duly filed in said Court, and for a judgment of your Honorable Court thereon.

Your petitioner, who was the defendant in the trial court and plaintiff in error in said Court of Appeals, believes that the aforesaid judgment of the said Court of Appeals is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination in conformity with the provisions of the Act of Congress in such cases made and provided, for the following reasons, to-wit:

The action was one brought by the respondent, an em-

ployé of petitioner, for damages for alleged personal injuries, while traveling upon a pass on a journey from Toledo, in the State of Ohio, to Pittsburg, in the State of Pennsylvania. The pass had thereon the following conditions:

> "In consideration of receiving this free pass, each of the persons named thereon, using the same, voluntarily assumes all risk of accidents, and expressly agrees that the Company shall not be liable under any circumstances, whether of negligence of itself, its agents, or otherwise, for any injury to his or her person, or for any loss or injury to his or her property; and that as for him or her, in the use of this pass, he or she will not consider the Company as a Common Carrier, or liable to him or her as such.
>
> And, as a condition precedent to the issuing and use thereof, each of the persons named on the face of this pass stated that he or she is not prohibited by law from receiving free transportation, and that the pass will be lawfully used.
>
> If presented by any other than the person or persons named thereon, the conductor will take up this pass and collect fare.
>
> I AGREE TO THE ABOVE CONDITIONS.
>
> W. H. MOHNEY.
>
> *To be signed in ink.*"

duly signed by the respondent.

The Court of Common Pleas of Lucas County, Ohio, rendered judgment in favor of respondent and denied the motion of petitioner for a new trial. The Court of Appeals affirmed the judgment of the Court of Common Pleas.

The said Court of Appeals erred in affirming the said judgment for the following reasons:

(1) The testimony of the respondent clearly showed that he was upon an interstate journey, that he was traveling upon a pass, and that the conditions were set forth thereon as above quoted, and that the signature thereon was that of respondent.

(2) The judgment in the trial court should have been rendered for petitioner.

(3) The motion of petitioner for a new trial should have been granted for the causes therein set forth.

(4) A petition in error was duly filed in the Court of Appeals alleging the errors complained of; the Court of Appeals found that "the stipulation and the testimony * * * showed conclusively that Mohney at the time of his injury, was upon an interstate journey," but affirmed the judgment of the Court of Common Pleas.

(5) The Court failed to apply the federal rule with reference to the liability of the defendant in error, while traveling on such pass.

(6) Said judgment is repugnant to, and in conflict with, the laws of the United States, and especially the Act of Congress of the United States, approved February 4, 1887, and the acts amendatory thereof, known as the Interstate Commerce laws.

(7) Said judgment is repugnant to, and in conflict with, the Constitution of the United States, and especially Article I Section 8, Clauses 3 and 18 thereof, to-wit:

> "The Congress shall have power * * * * * * *
> Clause 3. To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.
> Clause 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by the Constitution in the government of the United States, or in any department or offices thereof."

(8) Said judgment is repugnant to, and in conflict with Federal legislation and the common law rules as accepted and applied, in Federal tribunals.

(9) Said judgment is repugnant to, and in conflict with the Constitution, to-wit:

Amendments, Article V:

> "* * * Nor shall any person * * * be deprived of life, liberty, or property, without due process of law."

Article XIV:

> "* * * Nor shall any State deprive any person of life, liberty, or property, without due process of law."

The aforesaid judgment is in derogation of, and against the aforesaid title, right, privilege and immunity especially set up and claimed under the aforesaid Constitution, statute and authority.

In the trial court the judgment was rendered for the respondent, that judgment was affirmed by the Court of Appeals of Lucas County, Ohio, and a motion filed in the Supreme Court of the State of Ohio, asking for an order requiring the said Court of Appeals to certify its record was denied on April 23, 1918, and a petition in error filed in the Supreme Court of the State of Ohio, for the reversal of said judgment was denied and dismissed on the 11th day of June, A. D. 1918.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Court of Appeals of Lucas County, Ohio, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of the said Court of Appeals in the said case therein entitled The New York Central Railroad Company, Plaintiff in Error, vs. Wilbur H. Mohney, Defendant in Error, to the end that the said case may be reviewed and determined by this Honorable Court as provided by law, and that your petitioner may

have such other and further relief or remedy in the premises as to this Court may seem appropriate, and that the said judgment of the said Court of Appeals of Lucas County, Ohio, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray.

JOHN H. DOYLE,
HOWARD LEWIS,
Attorneys for Petitioner.

Of Counsel:
DOYLE & LEWIS,
F. W. GAINES,
TOLEDO, OHIO.

COUNTY OF LUCAS, }
STATE OF OHIO, } s. s.

HOWARD LEWIS, being duly sworn, says that he is one of the counsel for petitioner; that he prepared the foregoing petition, and that the allegations thereof are true as he verily believes.

HOWARD LEWIS.

Subscribed and sworn to before me this 20th day of August, A. D. 1918.

PAUL WM. ALEXANDER,
(SEAL) *Notary Public, Lucas County, Ohio.*

BRIEF FOR PETITIONER.

The facts in this case are found in the testimony of the respondent and the stipulations of petitioner and respondent.

Respondent, at the time of his injury, was in the employ of petitioner in the capacity of a fireman. He had in his possession an annual pass entitling him to ride over petitioner's line of railroad, upon certain trains, between the stations of Air Line Junction, near Toledo, and Collinwood, near Cleveland, Ohio. He was using this pass on his journey from Toledo, Ohio, to Pittsburgh, Pa. This testimony was as follows:

> "Q. On that morning you were going to the City of Cleveland, were you? A. Yes.
>
> Q. And were you going beyond the city of Cleveland? A. Yes, sir.
>
> Q. From the city of Cleveland, what other city were you bound for? A. Pittsburgh.

The purpose of his trip was to attend his mother's funeral. It was stipulated, as follows:

> "That a trip pass was at the request of the plaintiff issued by the defendant company, providing for the transportation of the plaintiff and his wife between the city of Toledo, Ohio, and the city of Youngstown, Ohio.
>
> That at the request of the plaintiff, a trip pass in favor of the plaintiff and his wife was secured by the defendant company, and left with the agent of the defendant company at the station in Youngstown, Ohio, providing transportation of the plaintiff and his wife from Youngstown, Ohio, to Pittsburgh, Pennsylvania, over the line of the Pittsburg & Lake Erie Railroad Company."

The accident which resulted in the injury to Mohney was caused by the second section of a passenger train collid-

ing with the first section, in which Mohney was riding, near the town of Amherst, and before Mohney reached Cleveland, Ohio.

Thus, Mohney was furnished with transportation for an interstate journey, and the Court of Appeals so stated in the Court's opinion:

> "The members of the Court are unanimous in the opinion that Mohney, although riding upon a pass that was good between two stations, to-wit: Air Line Junction and Collinwood, both located in the State of Ohio, was nevertheless, at the time of his injury traveling upon an interstate journey and was not an intrastate passenger as claimed by counsel for Mohney and as found by the trial court."

It was also stipulated if the general manager was called, he would testify:

> "That the wreck occurring on the defendant's line near Amherst, Ohio, on or about March 29, 1916, in which the plaintiff received some injuries, was due to the fact that the engineman of the second section of defendant's train No. 86 disregarded the caution signal about 8000 feet and the stop signal about 3000 feet in the rear of the first section of defendant's train No. 86."

Respondent's petition alleged that the

> "engineer of said second section, with gross carelessness ran his train."

and that

> "The engineer of the second section of said train was grossly negligent and careless in that he did not look for, see or observe the danger signals which were displayed along the line far in the rear of the train on which the plaintiff was riding, and which showed that the track ahead of said second section was not clear and that to proceed along the said track would result in a collision."

Petitioner's answer says

> "that those in charge of the second section of said train were unable to, and did not see the so-called block signals, for the reason that said signals were at said time covered by a sheet of fog, so that they could not, and were not observed by the engineer in charge of said second section."

Having this defense in mind, the petitioner stipulated that the engineman of the second section of defendant's train No. 86 disregarded the caution signal, as above.

Respondent having boarded a train at Toledo, Ohio, intending to go to Pittsburgh, Pennsylvania, to attend his mother's funeral, had entered upon an interstate journey. Free passes for his transportation had been procured for him.

While these passes were each issued for a portion of the trip, and some of them were between points in the same state, the journey on which he had started was interstate.

> Railroad Company v. Sabine Tram Company, 227 U. S., 111.
>
> Syl. "Shipments of lumber on local bills of lading from one point in a State to another point in the same State destined from the beginning for export, under the circumstances of this case are foreign and not intrastate commerce."
>
> "It is the nature of the traffic and not its accidents which determine whether it is intrastate or foreign."
>
> Pgs. 126-127. "That it is the nature of the traffic and not its accidents which determines its character is illustrated by *Ohio Railroad Commission v. Worthington*, supra. A rate of 70 cents a ton was imposed by the Commission on what was called 'Lake-cargo coal' from a coal field in eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie for carriage thence by lake vessels. The shipper transported the

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Pgs. 126-127. "That it is the nature of the traffic and not its accidents which determines its character is illustrated by *Ohio Railroad Commission v. Worthington*, supra. A rate of 70 cents a ton was imposed by the Commission on what was called 'Lake-cargo coal' from a coal field in eastern Ohio to the ports of Huron and Cleveland, Ohio, on Lake Erie for carriage thence by lake vessels. The shipper transported the

coal ordinarily upon bills of lading to himself, or to another for himself, at Huron, and it appeared that the coal might be accumulated in large quantities at Huron and only taken out of the accumulated lots from time to time for the purpose of shipping out of the State. The rate of 70 cents, however, covered not only the transportation of the coal to Huron, but placing it on the vessels and trimming it for its interstate journey. It was held that its transportation to Huron was an interstate carriage."

Baer Bros. v. Railroad, 233 U. S., 479.

Pg. 490. "But while there was no through-rate and no through-route there was in fact, a through shipment from St. Louis, Missouri, to Leadville, Colorado. Its interstate character could not be destroyed by ignoring the points of origin and destination, separating the rate into its component parts and by charging local rates and issuing local waybills, attempting to convert an interstate shipment into intrastate transportation."

Railway v. Louisiana R. R. Commission, 236 U. S., 157.

Pg. 163. "When freight actually starts in the course of transportation from one State to another it becomes a part of interstate commerce. The essential nature of the movement and not the form of the bill of lading determines the character of the commerce involved. And generally when this interstate character has been acquired it continues at least until the load reaches the point where the parties originally intended that the movement should finally end."

McFadden v. Railway, 241 Fed. Rep., 562.

Pgs. 565-566. "Whether commerce is interstate or intrastate must be determined by its essential character and not by mere billing or forms of contract. * * * Goods actually destined for points beyond the state of origin are necessarily in interstate commerce when

they are delivered to the carrier and start in the course of transportation to another state. * * * This is true whether the goods are shipped on through bills of lading or on initial bills only to a terminal within the same state, where they are transhipped and thereafter transported on new bills of lading to a destination beyond the state."

Ohio R. R. Commission v. Worthington, 225 U. S., 101.

Pgs. 108-109. "By every fair test the transportation of this coal from the mine to the upper lake ports is an interstate carriage, intended by the parties to be such, and the rate fixed by the Commission which is in controversy here is applicable alone to coal which is thus, from the beginning to the end of its transportation, in interstate carriage, and such rate is intended to and does cover an integral part of that carriage, the transportation from the mine to the Lake Erie port, the placing upon the vessel and the trimming or distributing in the hold, if required, so that the vessel may complete such interstate carriage."

Terminal Co. v. Interstate Commerce Commission, 219 U. S., 498.

Pg. 527. "It makes no difference, therefore, that the shipments of the products were not made on through bills of lading or whether their initial point was Galveston or some other place in Texas. They were all destined for export and by their delivery to the Galveston, Harrisburg and San Antonio Railway they must be considered as having been delivered to a carrier for transportation to their foreign destination, the Terminal Company being a part of the railway for such purpose. The case, therefore, comes under *Coe v. Errol*, 116 U. S., 517, where it is said that goods are in interstate, and necessarily as well in foreign, commerce when they have 'actually started in the course of transportation to another State, or delivered to a carrier for transportation.'"

The Court of Appeals found that respondent, at the time of his injury, was traveling upon an interstate journey. The jonrney being interstate, rights and liabilities thereunder are governed by the Federal laws exclusively. *Constitution of the United States*, Article I. Sec. 8, Clauses 3 and 18:

> "The Congress shall have power * * *
>
> Clause 3. To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes.
>
> Clause 18. To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or offices thereof."

Railway v. Rankin, 241 U. S., 319.

Pg. 326. "The state courts, treating the bill of lading as properly in evidence, undertook to determine its validity and effect. We need not, therefore, consider the mooted questions of pleading. The shipment being interstate, rights and liabilities of the parties depend upon acts of Congress, the bill of lading, and common law rules as accepted and applied in Federal tribunals. *Cleveland & St. Louis Ry. v. Dettlebach*, 239 U. S., 588; *Southern Express Co. v. Byers*, 240 U. S., 612, and cases cited; *Southern Ry. v. Prescott*, 240 U.S., 632.

Railway v. Searle, 229 U. S., 156.

Pg. 158. "If the Federal statute was applicable, the state statute was excluded by reason of the supremacy of the former under the National Constitution. *Second Employers' Liability Cases*, 223 U. S., 1, 53; *Michigan Central Railroad Co. v. Vreeland*, supra."

Turnan, et al., v. Railway, 105 So. Car., 287.

Pg. 289. "In the instant case, the Federal law

must control, for the contract of carriage was interstate, and was dependent upon the Act of Congress regulating passes for employees' families."

Prigg v. Pennsylvania, 16 Pet., 539.

Pg. 617. "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State Legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxilliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it."

Railway v. Prescott, 240 U. S., 632.

Pgs. 639-640. "As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of state legislation and decisions. And the question as to the responsibility under the bill of lading is none the less a Federal one because it must be resolved by the application of general principles of the common law."

Under the *Interstate Commerce Law*, the railroad can lawfully issue passes to certain classes of persons only. Sec. 1 (*U. S. Compiled Statutes*, Sec. 8563).

"The provisions of this Act shall apply to any corporation or persons * * * engaged in the transportation of passengers or property wholly by railroad * * * from one State or territory of the United

States * * * to any other State or territory of the United States, * * *"

"No common carrier subject to the provisions of this act shall * * * directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law * * *."

Sec. 22 (U. S. Compiled Statutes, Sec. 8595).

"* * * Nothing in this act shall be construed to prevent railroads from giving free carriage to their own officers and employees, or to prevent the principal officers of any railroad company or companies from exchanging passes or tickets with other railroad companies for their officers and employees * * *."

A pass issued by a railroad for interstate transportation to an employee must be deemed gratuitous, in view of the prohibitions in Section 2 of the *Interstate Commerce Law*, (U. S. Compiled Statutes, Sec. 8564):

Sec. 2. "That if any common carrier subject to the provisions of this Act shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

Sec. 6 (U. S. Compiled Statutes, Sec. 8569).

"No carrier, unless otherwise provided by this Act,

shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

Railway v. Rankin, 241 U.S., 319.

Pg. 327. "It cannot be assumed, merely because the contrary has not been established by proof, that an interstate carrier is conducting its affairs in violation of law. Such a carrier must comply with strict requirements of the Federal statutes or become subject to heavy penalties, and in respect of transactions in the ordinary course of business it is entitled to the presumption of right conduct. The law 'presumes that every man, in his private and official character, does his duty, until the contrary is proved; it will presume that all things are rightly done, unless the circumstances of the case overturn this presumption, according to the maxim, *omnia presumuntur rite et solemniter esse acta, donec probetur contrarium.*'"

Railway v. Maxwell, 239 U. S., 94.

"Under the interstate commerce act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it."

Railway v. Thompson, 234 U. S., 576, infra.

The majority of the Court of Appeals found that the pass was issued to respondent in part consideration of his services. The dissenting view was based on the Thompson case.

A carrier may validly stipulate in a pass for interstate transportation issued to an employee that it shall not be liable for negligent injury to him.

Railroad v. Thompson, 234 U. S., 576.

Pgs. 576-7. "The plaintiff, Lizzie Thompson, sued the Railroad Company, the plaintiff in error, to recover for personal injuries inflicted upon her while she was a passenger upon a train that was carrying her from South Carolina to Georgia. The railroad pleaded that she was traveling on a free pass that exempted the company from liability, the same having been issued to her gratuitously under the Hepburn Act of June 29, 1906, c. 3591, 34 Stat. 584, Sec. 1, as wife of an employee. This plea was struck out subject to the defendant's exception. The defendant also asked for an instruction that if the plaintiff was traveling on a free pass providing that the railroad should not be liable for negligent injury to her person she could not recover."

Pgs. 577-8. "The main question is whether when the statute permits the issue of a 'free pass' to its employees and their families it means what it says. The railroad was under no obligation to issue the pass. It may be doubted whether it could have entered into one, for then the services would be the consideration for the duty and the pass and by Sec. 6 it was forbidden to charge 'a greater or less or different compensation' for transportation of passengers from that in its published rates. The antithesis in the statute is between the reasonable charges to be shown in its schedules and the free passes which it may issue only to those specified in the act. To most of those enumerated the free pass obviously would be gratuitous in the strictest sense, and when all that may receive them are grouped in a single exception we think it plain that the statute contemplates the pass as gratu-

itous in the same sense to all. It follows, or rather is saying the same thing in other words, that even on the improbable speculation that the possibility of getting an occasional free pass entered into the motives of the employee in working for the road, the law did not contemplate his work as a conventional inducement for the pass but on the contrary contemplated the pass as being what it called itself, free.

As the pass was free under the statute, there is no question of the validity of its stipulations. This was conceded by the Court of Appeals, as we have stated, and is established by the decisions of this court. *Northern Pacific Ry. Co. v. Adams*, 192 U. S., 440. *Boering v. Chesapeake Beach Ry. Co.*, 193 U. S., 442."

Boering v. Railway, 193 U. S., 442.

Pg. 448. "This was an action brought in the Supreme Court of the District of Columbia to recover damages for personal injuries sustained by Mrs. Boering while riding in one of the coaches of the defendant, and caused, as alleged, by the negligence of the company.

"A trial before the court and a jury resulted in a verdict and judgment for the defendant, which was affirmed by the Court of Appeals of the District, 20 D. C. App., 500, and thereupon the case was brought here on error."

Pg. 450. " 'Having accepted the pass, he must have done so on the conditions fully expressed therein, whether he actually read them or not. *Squire v. New York Central Railroad*, 98 Massachusetts, 239; *Hull v. Boston, Hoosac Tunnel & Western Railroad*, 144 Massachusetts, 284; *Boston & Maine Railroad v. Chipman*, 146 Massachusetts, 107.'

"So in *Muldoon v. Seattle City Railway Company*, 10 Washington, 311, 313:

" 'We think it may be fairly held that a person receiving a ticket for free transportation is bound to see and know all of the conditions printed thereon which the carrier sees fit to lawfully impose. This is an entirely different case from that where a carrier

attempts to impose conditions upon a passenger for hire, which must, if unusual, be brought to his notice. In these cases of free passage, the carrier has a right to impose any conditions it sees fit as to time, trains, baggage, connections, and, as we have held, damages for negligence; and the recipient of such favors ought at least to take the trouble to look on both sides of the paper before he attempts to use them.'

"See also *Griswold v. New York, &c., Railroad Company*, 53 Connecticut, 371; *Illinois Central Railroad Company v. Read*, 37 Illinois, 484, 510. As was well observed by Circuit Judge Putnam in *Duncan v. Maine Central Railroad Company*, 113 Fed. Rep., 508, 514, in words quoted with approval by the Court of Appeals in this case:

" 'The result we have reached conforms the law applicable to the present issue to that moral sense which justly holds those who accept gratuities and acts of hospitality to perform the conditions on which they are granted.'

"We see no error in the record, and the judgment of the Court of Appeals is affirmed."

The Court of Appeals, in its opinion, states:

"This Court is unanimously of the opinion that the finding of the Court of Common Pleas, that the accident in this case was the result of gross negligence on the part of the railroad company, is abundantly sustained by the evidence before the trial court. The trial judge evidently gave full credit to the testimony which it was stipulated the General Manager of the Railroad Company would give if called as a witness and by virtue of the language of that stipulation, we think the trial court might well have characterized the negligence involved in stronger terms. In fact, we are clearly of the opinion that the negligence in this case, under the evidence, was willful and wanton.

"We think the decisions throughout the country, State as well as Federal, are practically unanimous to the effect that a contract relieving the railroad com-

> pany from the results of negligence of the character which I have mentioned, are clearly against public policy and void."

Apparently, the Court felt the need of the evidence, which it styled "of the character I have mentioned," in order to sustain its finding.

The Appellate Court's opinion was the first intimation to the parties that the negligence was willful and wanton. The Court uses the word "disregarded" in the stipulation as the basis for willfulness and wantonness. There is no allegation of willfulness or wantonness in respondent's petition, and there is no testimony to this effect. The only witness was the respondent, who answered the question,

> "Now what happened as you were in the rear coach of First 86, on your way to Cleveland, that morning?"

with the words,

> "You will have to ask somebody that knows; I was asleep."

The Century dictionary defines "disregard," "v. t., To omit to regard or take notice of; overlook, specifically to treat as unworthy of regard or notice." The same authority defines "regard" as "To look upon; observe; notice with particularity; pay attention to."

When, owing to a dense fog, an engineer disregarded a signal, *i. e.*, omitted to regard it, or overlooked it, or did not look upon it, or observe it, he is not guilty of wanton or willful negligence. To arrive at the meaning of the stipulation, the Court should substitute its synonym "overlooked" for "disregarded."

Gross negligence does not mean "willful and wanton negligence," but simply "negligence."

Railroad v. Lockwood, 17 Wall, 357.

"We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party and which he fails to perform than of the amount of inattention, carelessness or stupidity which he exhibits. * * * In each case, the negligence whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply 'negligence.'"

Kelley v. Mallott, 135 Fed., 74 (C. C. A.—8th Cir.).

Syl. "A characterization of defendant's negligence as gross, in a declaration, does not change the legal effect of the allegation from what it would have been, had the term 'negligence' alone been used.

Pg. 76. "The division of negligence into slight, ordinary, and gross may have originated in an endeavor, unconscious, perhaps, to justify exemplary damages where only compensative should be allowed. One who unintentionally fails in his duty, and thereby causes an injury, should make complete compensation. But to warrant punishment, there must be an actual or constructive intent to inflict the injury. Negligence and willfulness are as unmixable as oil and water. 'Willful negligence' is as self-contradictory as 'guilty innocence.'

"The substantive remains the same substantive, whatever the adjective. *Railroad Co. v. Lockwood*, 17 Wall., 357."

Thompson's Commentaries on the Law of Negligence, White's Supplement, Sec. 21.

"The term 'negligence' suggests only inadvertence, or want of ordinary care, and however great may be the degree of such want of care, so long as inadvertence remains, willfulness is excluded."

There being no willful or wanton negligence pleaded, no recovery can be had therefor, even if such had been proved.

Gentry v. U. S., 101 Fed., 51 (C. C. A.—8th Cir.).

"One may not bring a suit for one cause of action, and recover judgment for another. A Court can consider only what is in issue under the pleadings. Averments without proofs, and proofs without averments, are unavailing. The judgment may not go beyond a determination of the issues presented by the pleadings, nor beyond the scope and object of the prayers they contain. These are axioms in the law of pleading and practice. They rest upon the basic principles of one jurisprudence, that no man shall be deprived of his life, liberty and property without due process of law; and due process of law must give to the parties to be affected an opportunity to be heard respecting the justice of the judgment sought. It must be one which gives notice of the issue to be determined, which hears before it condemns, proceeds upon inquiry, and renders judgment only after trial."

If proper pleadings had set forth a cause of action based on willfulness and wantonness, nevertheless no such act or acts were proved, the record merely showing that the engineman on the second section disregarded the signals, *i. e.*, he failed to observe them. This omission of duty, even though constituting negligence, did not amount to wantonness or willfulness.

Thompson's Commentaries on the Law of Negligence, White's Supplement, Sec. 22.

"Wanton or willful negligence is defined as such a gross want of care and regard for the rights of others as to imply a disregard of consequences or a willingness to inflict injury. The same idea is conveyed in an approved instruction to the effect that

'before a party can be said to be guilty of willful or wanton conduct, it must be shown that the person charged therewith was conscious of his conduct, and conscious from his knowledge of existing conditions that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injury.' The purpose to inflict willful injury does not exist when the result of the wrongful conduct may be reasonably attributed to mere negligence or inattention to duty."

White's Personal Injuries on Railroads, Sec. 14.

"To constitute wanton negligence it is essential that the act done or omitted must have been done or omitted with a present knowledge that injury would result therefrom, for without this consciousness the omission would be absence of care alone. Hence it is, that a mere inadvertent failure to observe due care indicates mere negligence, but a conscious failure to observe due care constitutes willfulness."

Shearman & Redfield, Vol. I, Sec. 114a, 6th Ed.

"That one may be chargeable with wanton or reckless conduct, showing a conscious indifference to the consequences to others, equivalent to will intent, he must have realized the peril to another, or that such conduct was likely or would probably place him in such danger as he could not rescue himself from."

Stewart v. Railroad Co., 32 Iowa, 561.

Pg. 563. "A willful act is an obstinate, stubborn, perverse act, and an act done willfully is one done stubbornly, by design, with a set purpose." (See also *Lee v. Rd.*, 66 Iowa, 131).

Fluckey et al. v. Southern Ry. Co., 242 Fed., 468.

"Gross and wanton negligence of a railway company, to avoid the contributory negligence of a person struck by a railway motor car, must be really willful or so highly reckless as to constitute the equivalent of willfulness."

Railway v. Miller, 149 Ind., 490.

Pg. 502. "Negligence in a case, whether it be in a degree that may be termed slight, ordinary, or gross, is nevertheless negligence still; and when willfulness is the essential element in the act or conduct of the party charged with the wrong, the case ceases to be one of negligence.

"Willfulness and negligence are the opposites of each other; the former signifying the presence of intention, and the latter its absence."

Pg. 509. "The jury, by this finding, expressly attribute the death of the deceased to the negligent act of the fireman in omiting to give any signals, and, while this act of omission on the part of the employes in control of the engine may be said to be negligence *per se*, still it was but an act of nonfeasance, and not one of aggressive character, and cannot establish the willful or intentional killing as alleged in the complaint. For, as heretofore asserted, when willfulness is the element in the act or conduct of the party charged, the case ceases to be one of negligence. There can be no middle ground between willfulness and negligence, for, as we have seen, the authorities affirm that each of these elements is the opposite of the other. Consequently, when the facts in a given case show that the injury of which the plaintiff complains is the result of the negligent act or conduct of the defendant, then the fact that such negligence may be said to be of such a degree as to be considered 'gross negligence' cannot support a charge that the injury was willful or intentionally inflicted by the party accused."

King v. Railroad, 114 Fed., 855 (C. C. A., 5th Cir.).

Syl. 2. "Where a man, just after stepping on a railroad track in the yards, was run over by part of a freight train backing at the rate of about eight miles per hour, while the conductor, who was on the rear car, was looking in the opposite direction to see if a switch was properly turned for a passing train, and none of the trainmen saw the man on the track, there was no such wanton recklessness or gross negligence as would render unavailable a plea of contributory negligence."

Fluckey et al. v. Southern Ry. Co., 242 Fed., 468 (C. C. A., 6th Cir.).

Pgs. 470, 471. "The plaintiff here does not claim any evidence tending to show an intention on the part of the motorman to injure the plaintiff nor any actual willfulness. She seeks to build up a constructive willfulness through the cumulative effect of the violation of city ordinances. One ordinance required gates or flagmen at all railroad crossings within the corporate limits; this crossing had neither. Another forbade that railroad cars should be left standing within 150 feet of the highway crossing, so that they would obstruct the view down the track; a car was standing within that distance. A third ordinance (as we assume for the purpose of this opinion), limited to six miles per hour the rate of speed of all trains or cars within the city limits; this motor car was moving at a higher speed.

* * * * * * * *

"No one claims, however, that the violation of a single ordinance is even evidence of wanton or willful negligence; and, indeed, no reason is suggested upon which such a claim could have been based.

"Plaintiff's position is that the simultaneous violation of three city ordinances indicates a degree of indifference or recklessness which should have the same effect as deliberate willfulness. We cannot think that this inference is permissible, merely from this basis

and regardless of the character of the ordinance or the nature of the violation. If the breaking of one ordinance is not of itself at all indicative of willfulness, the multiplication of such instances cannot create a basis of inference otherwise nonexistent.

"* * * in cases like the present, the intent to run over a traveler upon the highway has no connection with the intent not to observe the ordinances, and the utmost that can be established by the breach of several ordinances is a general indifference to the observance of municipal regulations. Between this inference and the other one, there is no bridge; and the case is one for the application of the arithmetical rule that the addition of nothing to nothing cannot make something.

"A review of all the cases cited by plaintiffs develops that in each one wanton or willful negligence was inferred from the character of defendant's acts, and not primarily merely from the ordinance violations; and when we turn aside from the theory that the breach of three ordinances in gross inherently tends to show wantonness, and consider the nature and effect of the breaches here involved, we get the same result. There had been no municipal determination that this particular crossing needed gates or a flagman; the ordinance was equally imperative as to every crossing in the city; and we must take notice of the vast number of such crossings within the corporation limits of every large city, where the degree of need for this precaution is not extreme."

Louisville & N. R. Co. v. Muscat & Lott, 41 So., 302.

Syl. 1. "The act of persons in charge of a railroad train in intentionally running it over a public street crossing in a city at a speed more rapidly than allowed by ordinance is not wanton or willful misconduct, unless the persons in charge had knowledge and were conscious that injury would probably result."

Railroad v. Mitchell, 134 Ala., 261.

Pg. 265. "The count alleges, that 'defendant through its servant or agent in charge of control of said locomotive engine, wantonly or intentionally caused the death of plaintiff's intestate in the manner following, viz: said servant or agent, with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad in said town or village of Elmore, and would be in great peril of their lives from the rapid running of said engine through said town or village, without proper and sufficient warning or notice of the approach of said engine, wantonly or intentionally ran said engine through said town or village with great rapidity and without proper or sufficient warning or notice of the approach of said engine, and as a proximate consequence thereof, said engine ran upon or against plaintiff's said intestate in said town or village, and so injured him that he died.'"

Pgs. 265, 266. "Stripped of all unnecessary verbiage, the wanton or intentional act set up in this count is, that the engineer 'wantonly or intentionally ran said engine through said town or village, with great rapidity and without sufficient warning, or notice of the approach of the engine,' with knowledge or notice that numerous persons were or would likely be upon the tracks of said railroad—as a proximate consequence of which wanton or intentional act of running the engine rapidly, without proper or sufficient warning, the deceased was killed. This was not an averment of an intention to injure the intestate, and, therefore, is not the equivalent of willfulness; nor is it an averment of a reckless disregard as to probable consequences, such as would make it wantonness on the part of the engineer."

Railway v. Fisk, 159 Fed., 373.

Pg. 377. "In reference to liability for injury to a trespasser, the doctrine is settled, in this jurisdiction at least, that it arises only for injuries wantonly inflicted, which involves timely discovery and willful disregard of the danger in running the trespasser

down—criminal conduct, and not negligence, in any sense of the term."

The respondent having started from Toledo, in the State of Ohio, to Pittsburgh, in the State of Pennsylvania, was upon an interstate journey. The Court of Appeals so found. At the commencement of his journey, he had been supplied with the means of traveling upon free passes from Toledo to Pittsburgh, the purpose of his journey being to attend his mother's funeral. These passes were gratuitous, but the majority of the Court of Appeals found to the contrary. That Court also "denied asserted Federal rights on a basis of fact having no support in the record."

Telegraph Co. v. Newport, 38 Supreme Court Reporter, Pg. 566.

Pg. 570. "But the question arises whether the basis of fact upon which the state court rested its decision denying the asserted Federal rights has any support in the record; for, if not, it is our duty to review and correct the error."

In conclusion, we respectfully submit that the judgment of the Court of Appeals is in derogation of, and against, your petitioner's title, right, privilege and immunity especially set up and claimed under the Constitution, Act to Regulate Commerce, and the common law rules as accepted and applied in Federal tribunals, and should be reviewed and reversed by this Honorable Court.

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